In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-171

DOROTHY DAVIS BARR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, while residing in New Mexico, sought unemployment insurance benefits from New York. She contends that the interstate appeals procedure, under which her testimony could have been taken in New Mexico and sent to New York for consideration, did not afford her a fair hearing; she therefore seeks to enjoin further payments by the Secretary of Labor of state administrative expenses under 42 U.S.C. 503(a)(3).

After leaving her employment in New York, petitioner moved to New Mexico, where she filed a claim for unemployment insurance benefits under the New York Unemployment Insurance Law.[1] Pursuant to the "Interstate Benefit Payment Plan" ("Interstate Plan"), a multi-state agreement to which both New York and New

---

[1] She apparently subsequently moved to Montana (Pet. App. A6).

Mexico have subscribed, the New Mexico Employment Security Commission, with whom petitioner's claim had been filed, transmitted the claim to the New York Department of Labor for determination.[2] The Industrial Commissioner of the State of New York ruled that petitioner was not entitled to benefits since she had left her last job without good cause, and notified petitioner that she had the right to appeal this decision. Under New York Law, petitioner had the right on appeal to a full and complete hearing in New York State. In addition, pursuant to the Interstate Plan, petitioner could testify before a referee in New Mexico; that testimony, and any other supporting evidence submitted by petitioner, would be forwarded to New York officials for consideration in determining her appeal (Record on Appeal, p. 18).[3]

Without exercising her administrative appeal rights, petitioner commenced this action for declaratory and injunctive relief against the United States and the Secretary of Labor of the United States and against New York and New Mexico officials. The complaint alleged that, in view of the distance between New York and New Mexico, petitioner could not attend a New York hearing and that the procedures in New Mexico were insufficient since her appeal would be decided by officials in New York. These circumstances, petitioner alleged, deprived

---

[2] Under the Interstate Plan and implementing regulations, the State in which a claim is filed ("agent state") provides a forum for the convenience of the parties who have left the State against which the claim is filed ("liable state"). The latter accepts as authentic the evidence received by the agent state and renders a decision on the basis of that and other evidence in the record.

[3] A copy of the record on appeal has been lodged with the Clerk of this Court.

her of due process of law and violated her right to a fair hearing under 42 U.S.C. 503(a)(3) (Record on Appeal, pp. 6-7).[4]

The district court granted each defendant's motion to dismiss the complaint. The court of appeals affirmed the district court's ruling that the complaint failed to state a claim upon which relief against the federal defendants could be granted.[5] It also concluded that the complaint against them might have been dismissed on jurisdictional grounds.[6]

1. Since petitioner worked and earned her wage credits in New York State, her right to unemployment insurance benefits arises under the law of New York. Even though petitioner subsequently moved to New Mexico, New York law still accords petitioner the opportunity for a full hearing in New York State on her appeal; it therefore satisfies the "fair hearing" requirement of 42 U.S.C. 503(a)(3). The additional procedures available under the Interstate Plan represent a reasonable effort to provide a convenient method for the assertion of

[4] 42 U.S.C. 503(a)(3) provides that the Secretary of Labor shall not certify administrative payments to state programs unless he finds that the state law provides "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied * * *."

[5] The court of appeals affirmed the district court's dismissal of the complaint against New York officials for lack of jurisdiction, and against New Mexico officials for failure to state a claim upon which relief could be granted (Pet. App. A3-A9).

[6] The court below also approved the district court's ruling that petitioner had not met the requirements of Fed. R. Civ. P. 23, entitling her to maintain the suit as a class action and that a three-judge court was not required because of the want of a substantial federal question (Pet. App. A9). It found it unnecessary to rule on New Mexico's suggestion that the appeal was mooted by petitioner's move to Montana (Pet. App. A6).

petitioner's claims in her subsequent domicile, while recognizing that jurisdiction over the claim and the employer remains exclusively in New York.[7] There are simply no statutory provisions giving New Mexico jurisdiction over either the claim or the New York witnesses, nor any constitutional necessity for such provisions. Cf. *Hanson* v. *Denckla*, 357 U.S. 235, 250-254.[8]

2. This case raises no issues concerning the scope of the mandamus statute (28 U.S.C. 1361) warranting review by this Court. Even under petitioner's interpretation of that statute, actions lie only where there is "a clear violation of an ultimate existing legal duty owed the plaintiff" (Pet. 9). But here, the Secretary's legal duty was to certify administrative payments if the state procedures provided an "[o]pportunity for a fair hearing * * * for all individuals whose claims for unemployment compensation are denied" 42 U.S.C. 503(a)(3). Assuming that such a limitation establishes a legal duty owed to plaintiff, there was no violation of that duty, since an opportunity for a full hearing was provided to petitioner, and all other claimants whether resident or non-resident, by New York. The statute contains no requirement concerning the location of the hearings, and none may be implied.

---

[7] While the court below did not find it necessary to reach the district court's ruling that petitioner should have exhausted her administrative remedies (Pet. App. A6-A7), petitioner's failure to make use of available procedures to appeal the denial by New York of her claim leaves her contention that those procedures were inadequate, an unsupported speculation.

[8] Although petitioner denies that she is attempting to assert that New Mexico has jurisdiction over her claim and may compel the attendance of the employer's witnesses (Pet. 3), it is difficult to see how otherwise New Mexico can provide the full hearing she desires (Pet. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.